CORBIN DAVIS, Chief Clerk
Michigan Supreme Court
P.O. Box 30052
Lansing, MI 48909

Re: Proposed Amendment to
Michigan Court Rules

Dear Mr. Davis,

Enclosed for your record and submission to the appropriate Justices please find Proposed Amendment to Court Rule 6.502(G)(1) and 7.204(B)(2).

Thank you.

Sincerely,

James L. Howard

James L. Howard #135442
Central Michigan Corr Facility
320 N. Hubbard Street
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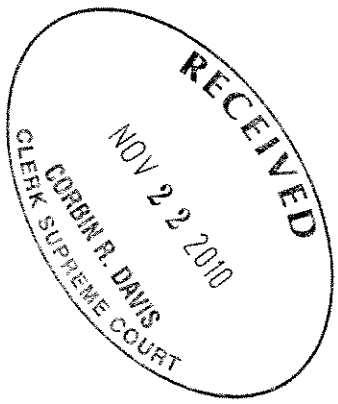
Dated: November 18, 2010

cc: file



PROPOSED AMENDMENT TO COURT RULES

Subchapter 6.500 of Michigan Court Rules was created and adopted October 1, 1989 as an exclusive means to challenge convictions in Michigan for a defendant who has had an appeal of right or by leave, who hes unsucessfully sought leave to appeal, or who is unable to file an application for leave to appeal to the Court of Appeals because 18 months (now 12 months) have elapsed since the judgment. See also MCR 7.205(F)(3).

The rules are similar in structure to the federal rules governing procedures under 28 USC §2255. See staff comment. August 1, 1995, subchapter 6.502(G) was adopted and became effective limiting a defendant to filing one and only one motion after that date unless there was a retroactive change in law that occurred after the first motion for relief from judgment or a claim of new evidence that was not discoverable before the first motion was filed. Ambrose v Recorder's Judge, 459 Mich 884 (1994).

This successive motion rule made no exception to the two reasons other than at the discretion of the appellate courts, that would allow the filing much less review, of a second motion for any other reason such as ineffective assistance of counsel on issues that were outcome determinative, jurisdictional defects not waived by guilty pleas, and claims of actual innocence or miscarriage of justice.

For years, defendants, attorneys, courts and even prosecutors as a whole have struggled on the question of whether a defendant was entitled to relief under a variety of

circumstances not defined in both the successive motion rule and cause and prejudice requirement. This in effect has caused thousands of defendants' denial and dismissal of motions for relief from judgment over a span of 21 years, either for lack of an effective remedy or clarity in the rules by defendants' filing such motions or attorneys as well as the courts hearing and interpretation of the rule.

RETROACTIVE APPLICATION

It was not until 6 years after the rule became effective when the courts held that if a defendant filed a motion before August 1, 1995, he was still entitled to file one more motion after that date. Ambrose, supra. The problem with the rule later became known when challenged on the ground that it could not be applied retroactively to convictions prior to October 1, 1989.

For example, approximately nine (9) years after the rule became affective the Federal Courts' held in a trio of cases that if a habeas petitioner were convicted before October 1, 1989, a petitioner was not required to meet the strick standard of cause and prejudice for not raising an issue earlier on direct appeal or by leave. See Rogers v Howes, 144 F3d 990, 993094 (6th Cir 1998), Alvarez v Straub, 64 F Supp 2d 686 (E.D. Mich 1999), Luberda v Trippett, 211 F3d 1004, 1109 (6th Cir 2000).

Although this Court continues to apply the rule retroactively under its ruling in People v Jackson, 465 Mich 390 (2001), there are still hundreds of defendants' trapped in the

system without any remedy to challenge their convictions and/or sentences due to procedural default. Many of these convictions and sentences were obtained under prior harsher laws, over-zealous prosecutors' and poor performance of attorneys in both the trial and appellate courts' before the legislature changed the law and created judicial over-sight by statutory sentencing guidelines and appellate standards.

As of this date Michigan still has no performance standards for trial attorneys. See Amicus Curiae brief filed by this writer James L. Howard in Duncan v State, 774 NW2d 89 (2009). Amending the rule to allow a defendant who is barred under MCR 6.502(G)(1) one last opportunity to raise all meritorious issues whether required to show cause and prejudice or not, would serve a dual purpose for defendants' and the judicial system as a whole:

> (1) Defendants' trapped under the new rule of 6.502(G) would have one last opportunity for review of meritorious claims of actual innocence or excessive sentences never heard before;
>
> (2) It would allow the Courts' to close cases permanently and relieve lower and appellate courts' of the burden or expending valuable resources to hearing repeat motions even if leave is not granted if applying the procedural bar by simply returning the motion without action unless within one of the exceptions of the rule.

Initially, this may appear to add more costs under the current system. However, rather than tie-up every circuit court of the 83 counties and the appellate courts' from hearing new cases and other important matters, create a special court specifically for reviewing only post-appeal matters. To better

process these cases and wade through volumes of transcripts, this Court could invite volunteer law students with an oversight attorney from colleges such as the University of Michigan Clinical Law Program to review cases and determine what merit, if any, exist and recommend what remedy should be provided. Retired judges could also play an important role in hearing these cases after having been screened and submitted.

The major problem with the successive motion rule is that there is no consistency in its application. For example, some clerks from different counties are unilaterally rejecting second 6.500 motions without submission and review of the judge. This practice derives from an isolated reading of 6.502(G)(1) without consideration of the language set forth in 6.508(D)(3) "other than jurisdictional defects".

As an active experienced writ writer, law clerk and prisoner advocate who has filed numerous 6.500 motions and filed dozens and dozens of criminal appeals for prisoners' for over 20 years, I recently had an occasion to encounter a prime example of how rule 6.502(G)(1) is being misinterpreted and rejected by circuit clerks and judges alike while prisoners continue to languish in prison years beyond what they could or should have to serve.

In People v Jackie Erwin, 94-8094-FC, Livingston County Circuit Court, before Honorable successor Judge David Reader, a clerk who refuses to identify herself only by initial in any correspondence and upon request from Erwin's mother in person at the courthouse, has rejected Erwin's properly filed second 6.500

motions on two occasions even though the issue was based on jurisdictional defect. Only after several letters, phone calls and personal visits by family to the courthouse did the clerk agree to submit the motion to Judge Reader who is still sitting on the motion.

Erwin's case is unique in that seven (7) months after he was sentenced in 1994 the prosecutor charged Erwin, brought him back to court, and with the poor advice of counsel and approval of the previous judge, secured a plea conviction on the habitual enhancement and sentenced Erwin to 20 to 40 years based on a misdemeanor. Now, after Erwin identified that the plea and resentencing was invalid and illegal, the clerk and court are denying access to correct this wrong under 6.502(G)(1).

In another case that is illustrative of how prosecutors' are overzealous and appointed counsel and judges' stand mute and allow wrongful convictions and sentences that are barred from challenge, see People v Jerry Lee Main, 09-002785-FH, Berrien County Circuit Court, before Judge Charles LaSata. Main was denied relief from judgment even when he filed no prior appeal or motion. Main first filed a motion to withdraw plea or resentence shortly after the time allotted under 6.429(C), but still within the time for filing an application for leave to appeal. The Court dismissed the motion as premature and suggested that Main seek leave in the Court of Appeals. However, the motion was necessary to preserve the claims before filing an appeal.

Main was unable to file an application in the Court of Appeals because the time had elapsed waiting for a decision from

the Court and what little time that remained to file for leave was near enough to simply wait to file a 6.500 motion.

Main's motion sought to have an untimely and improper habitual charge and sentence on top of an elevated Retail Fraud vacated and dismissed. The Court invoked the 6.508(D) rule for failure to show good cause and prejudice even though Main filed a delayed 6.429(C) motion in the trial court prior to invoking the 6.500 remedy and no prior appeal or motion was filed. Main argued that counsel was ineffective by allowing the prosecutor to overcharge him which made a difference between a maximum one (1) year sentence and eight (8) year sentence with the habitual. The court never addressed the claim. See also the trio of dissents by Justice Kelly, Cavanagh and Markman in People v William Carter, 477 Mich 998 (2007), citing People v Kimble, 470 Mich 305, 314 (2004)(holding that good cause and prejudice is shown by proving ineffective assistance of counsel in sentencing matters).

As the Court of Appeals held in People v Clark, 274 Mich App 248 (2002), appellate courts' have discretion to grant second or subsequent motions if good cause and prejudice is shown. The Supreme Court has remanded when trial courts' have mischaracterized prior motions and granted leave on claims of ineffective assistance of counsel when two or more motions were previously filed. See People v Wilson, 459 Mich 970 (1999), People v Edwards, 465 Mich 961 (2002), People v Podlaszuc, 480 Mich 866 (2008), In re Kadnak, 480 Mich 1148 (2008). Other recent cases have been remanded as well.

Unlike Federal law, which provides that a petitioner who wishes to file a second petition must seek leave in the Sixth Circuit first, 6.508(D)(3) clearly provides for the exception "other than jurisdictional defects" in addition to the retroactive change in law and new evidence rule. It would be contrary to public interest to allow a state prosecutor with the approval of the court and defense counsel to act without jurisdiction which created the defect, and then later throw-up a barrier by invoking 6.502(2)(1) to correct this wrong under the exclusive remedy of the rule.

Although the rule specifically states in no uncertain terms that a defendant may not appeal the denial of a second motion under 6.502(G)(1), and can be summarily rejected by the clerk without submission to the court, the Court of Appeals and this Court have carved out to the rule an exception on a case-by-case analysis. This means that only those defendants' who are willing and able to pay the filing fee on the mere hope that the appellate courts' might grant leave might be heard and might be granted leave. These evidentiary matters are best left to trial courts.

Here, under the facts of Erwin, Main or any other similar case which involves a wrongful conviction or sentence based on jurisdictional defects created by the state in the form of charging, a corrected sentence or resentencing, a defendant should never be barred an opportunity to challenge at the state level because it would prevent a defendant from ever obtaining review of meritorious issues. See United States v Hadden, 475

F3d 652 (CA 4 2007)(holding that a petitioner who had been resentenced or had his sentence corrected is entitled to appeal his sentence without having to obtain a certificate of appealability).

The Court reasoned that a new or corrected sentence presents much the same situation was exists after a new trial is completed, and to hold that it is not appealable would prevent the defendant from ever obtaining review. Id.

While it is clear that the purpose of the rules' creation was to allow defendants' an opportunity to challenge wrongful convictions and invalid/illegal sentences, it is also clear that the rule has not been followed and in fact, abused through misinterpretation, mis-characterization and lack of clarity. Rather than continue to allow clerks and circuit courts' to make erroneous procedural decisions of a rule designed to be remedial, this Court should put some clarity in the rule so that clerks' will submit such motions and courts' will hear the motion on the merits. It would also serve to reduce the number of appeals, court and judicial resources and the financial burden on indigent defendants along with the arduous task of going through what turns out to be a meaningless ritual and gauntlet of appeals while languishing in prison. Below is a list and suggestion of what rule should be amended or clarified:

> (A) Amend 6.502(G)(1) to allow those defendants' convicted and sentenced prior to October 1, 1989, one final opportunity to file a 6.500 motion either in pro per or with assistance of counsel that would limit the motion to claims of retroactive change

in law, new evidence, jurisdictional defects that goes to the states authority to convict or sentence, and serious claims of ineffective assistance of trial or appellate counsel that are outcome determinative and not harmless errors;

(B) Clarify the existing rule 6.502(G)(1) that will require clerks to process second or subsequent motions to the judge for review rather than unilaterally rejecting the motion unless not filed to form;

(C) Amend 6.502(G)(1) by inserting the language " other than jurisdictional defects" which may be created by prosecutors', courts' or other officials that allow charges and increased sentencing beyond statutory authority regardless of whether an unsuspecting defendant becomes aware of it at the time due to ineffective assistance of counsel, or lack of knowledge in the law;

(D) Amend 6.502(G)(1) by incorporating claims of ineffective assistance of counsel that was in some specific way outcome determinative of the proceedings, trial and sentence;

(E) Amend 6.502(G)(1) to exclude prior motions that sought to correct a PSI consistent with the ruling of People v Lloyd, 284 Mich App 703 (2009), which held that a lower sentencing court may not dismiss on procedural grounds claims challenging inaccuracies in presentence reports, or other similar motions such as a motion to grant jurisdiction to the Parole Board under time limitations or good cause requirement that a defendant could have raised in a prior appeal or motion. The latter should especially be excluded because any motion to grant the Parole Board jurisdiction would be premature until a defendant/prisoner reaches a time near his earliest release date;

(F) Amend 6.502(G)(1) language which states "a defendant may not appeal the denial or rejection of a successive motion" and "the Court shall return without filing any successive motion for relief from judgment and replace it with a short plain statement that "a defendant need not show cause and

prejudice under any one of the above exceptions;

(G) Amend 7.204(B)(2) filing fee requirement only on appeals denying motions under 6.502(G)(1), unless and until leave is granted;

(H) In those cases that are appealed from a denial under 6.502(G)(1), where a clerk pre-screens an application and determines that an application should not be submitted to a panel of justices, amend 7.204 to provide that if a clerk does not submit an application to a panel of justices but invokes 6.502(G)(1), then the clerk must enter a bypass order to the Michigan Supreme Court or simply transfer the case to the Supreme Court without the burdensome financial costs and hardship of a filing fee for an application that is never heard and signed by a three panel of justices.

For the above reasons this Court is urged to amend, clarify and/or repeal the above referenced rules in the interest of justice and finality for all parties.

Respectfully Submitted,

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Dated: November 16, 2010